

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DWAYNE TYRONE STALLWORTH,

Petitioner,

v.

CASE NO. 02-CV-74812-DT
HONORABLE ARTHUR J. TARNOW

PAUL RENICO,

Respondent.

_____ /

**OPINION AND ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY
JUDGMENT AND SETTING DEADLINE FOR A RESPONSIVE PLEADING¹**

I. Introduction

Petitioner Dwayne Tyrone Stallworth, a state prisoner currently confined at the Muskegon Correctional Facility in Muskegon, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that he is incarcerated in violation of his constitutional rights.² Petitioner was convicted of first-degree felony murder following a bench trial in the Recorder’s Court for the City of Detroit and was sentenced to life imprisonment without the possibility of parole in 1993. This matter is before the

¹Staff Attorney Cheryl Takacs Bell provided quality research assistance.

²At the time he instituted this action, Petitioner was incarcerated at the St. Louis Correctional Facility in St. Louis, Michigan. Respondent is the warden at that facility.

Court on Respondent's motion for summary judgment seeking dismissal of the petition for failure to comply with the statute of limitations. For the reasons set forth below, Respondent's motion is **DENIED** and Respondent must file an answer addressing the petition's merits.

II. Procedural History

Following sentencing, Petitioner filed an appeal as of right with the Michigan Court of Appeals, which affirmed his conviction and sentence. *People v. Stallworth*, No. 170796 (Sept. 13, 1996). Petitioner filed a delayed application for leave to appeal with the Michigan Supreme Court, which was denied. *People v. Stallworth*, 455 Mich. 873, 568 N.W.2d 86 (July 25, 1997).

On August 14, 1997, Petitioner filed a petition for writ of habeas corpus with this Court, which was dismissed without prejudice for failure to exhaust state court remedies. In making this ruling, the Court also denied Petitioner's application to stay the proceedings pending further exhaustion of state remedies. *Stallworth v. Hofbauer*, No. 97-CV-74082-DT (E.D. Mich. Sept. 22, 1999) (accepting Magistrate Judge's Report and Recommendation).

On August 25, 2000, Petitioner filed a motion for relief from judgment with the trial court, which was denied. *People v. Stallworth*, No. 93-006075-01 FY (Recorder's Ct. Jan. 31, 2001). Petitioner then filed an application for leave to appeal with the

Michigan Court of Appeals, which was denied. *People v. Stallworth*, No. 237397 (Mich. Ct. App. March 19, 2002). Petitioner also filed an application for leave to appeal with the Michigan Supreme Court, which was denied. *People v. Stallworth*, 467 Mich. 893, 653 N.W.2d 412 (Oct. 29, 2002).

Petitioner filed the present petition for writ of habeas corpus, dated November 25, 2002, on December 5, 2002, asserting claims concerning the effectiveness of trial and appellate counsel, the adequacy of his notice of the charges, and the sufficiency of the evidence. On August 11, 2003, Respondent filed a motion for summary judgment seeking dismissal of the petition for failure to comply with the one-year statute of limitations established by 28 U.S.C. § 2244(d)(1). Petitioner filed a reply to the motion on October 21, 2003 asserting that it should be denied because the one-year period should be tolled for the time in which his first habeas petition was pending before this Court.

III. Discussion

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2241 *et seq.*, became effective on April 24, 1996. The AEDPA governs the filing date for this case because Petitioner filed his habeas application after the AEDPA's effective date. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA amended 28 U.S.C. § 2244 to include a one-year period of limitations for habeas petitions brought by prisoners challenging state court judgments. The revised statute provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

In this case, Petitioner's convictions became final after the AEDPA's April 24, 1996 effective date. Petitioner completed his direct appeals on July 25, 1997. He then had 90 days in which to seek a writ of certiorari with the United States Supreme Court. *See* Rule 13(1), Supreme Court Rules. With regard to the statute of limitations, therefore, his conviction became final on October 23, 1997. Petitioner was thus required to file his

federal habeas petition on or before October 23, 1998, excluding any time during which a properly filed application for state post-conviction or collateral review was pending in accordance with 28 U.S.C. § 2244(d)(2).

Petitioner's first federal petition for writ of habeas corpus, which was pending in this Court from August 14, 1997 until September 22, 1999, did not toll the one-year period under this statutory provision. *See Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (holding that a federal habeas petition is not an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2) so as to toll the limitations period).

Petitioner filed his state court motion for relief from judgment on August 25, 2000. Thus, the one-year limitations period had expired before Petitioner filed his application for state post-conviction review. A state court post-conviction motion that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled. *See Hargrove v. Brigano*, 300 F.3d 717, 718 n. 1 (6th Cir. 2002); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000); *see also Jurado v. Burt*, 337 F.3d 638, 641 (6th Cir. 2003). Thus, Petitioner's state post-conviction proceedings seemingly did not toll the running of the statute of limitations. The AEDPA's limitations period is only tolled while a prisoner has a properly filed post-conviction motion under consideration. *See* 28 U.S.C. § 2244(d)(2); *Hudson v.*

Jones, 35 F. Supp. 2d 986, 988 (E.D. Mich. 1999). The AEDPA's limitations period does not begin to run anew after the completion of state post-conviction proceedings. *See Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001). Petitioner does not assert that the State created an impediment to filing his habeas petition or that his claims are based upon newly-created rights or newly-discovered facts. His habeas petition is thus barred by the statute of limitations set forth in 28 U.S.C. § 2244(d).

The United States Court of Appeals for the Sixth Circuit has determined that the one-year limitations period is not a jurisdictional bar and is subject to equitable tolling. In *Dunlap v. United States*, 250 F.3d 1001, 1008-09 (6th Cir. 2001), the Sixth Circuit ruled that the test to determine whether equitable tolling of the habeas limitations period is appropriate is the five-part test set forth in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988).

The five parts of this test are:

(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim.

Dunlap, 250 F.3d at 1008.

Petitioner has established that he is entitled to equitable tolling of the limitations period. Petitioner filed his first federal habeas petition on August 14, 1997 before his state court convictions became final and it remained pending in this Court for two years

until September 22, 1999 – well past the expiration of the one-year limitations period – before being dismissed without prejudice to allow exhaustion of state court remedies. Petitioner then proceeded to exhaust his state remedies before filing the instant petition.

Although Petitioner knew or should have known of the one-year limitations period when the AEDPA went into effect on April 24, 1996, he had no reason to believe that his first habeas petition would not toll the one-year period. Petitioner sought, but was denied, a stay of those proceedings pending his exhaustion of state court remedies. In denying his request for a stay, the Court indicated that the one-year period may be tolled for the time in which his petition was pending and/or that any subsequent petition could relate back to the original filing. Given the Court's delay in dismissing that first petition and its denial of the requested stay, it would be inequitable to dismiss the present petition for failure to comply with the limitations period. *See Rupert v. Johnson*, 83 F. Supp. 2d 801, 805 (W.D. Texas 1998) (the AEDPA's limitation period should be equitably tolled for time when prior federal habeas petition, which had been dismissed without prejudice to allow for exhaustion of state remedies, was pending); *see also Duncan, supra* (concurring opinion of Stevens, J.). Further, Petitioner could have reasonably believed that his first habeas petition operated to toll the one-year limitations period given the Court's decision and the ambiguity of the statutory language and the split among the circuit courts which had considered the issue prior to the Supreme Court's decision in *Duncan*. *Cf. Jiminez v.*

Rice, 222 F.3d 1210 (9th Cir. 2000), *reh'g granted and opinion withdrawn*, 246 F.3d 1277 (9th Cir. 2001) (statute of limitations not tolled during pendency of federal habeas petitions); *Grooms v. Johnson*, 208 F.3d 489 (5th Cir. 1999) (same); *Jones v. Morton*, 195 F.3d 153 (3rd Cir. 1999) (same); *Petrick v. Martin*, 263 F.3d 624 (10th Cir. 2001) (statute of limitations is tolled during pendency of federal habeas petitions); *Walker v. Artuz*, 208 F.3d 357 (2nd Cir. 2000) (same, but reversed by the Supreme Court in *Duncan*, *supra*). Lastly, the record indicates that Petitioner has shown some diligence in seeking state post-conviction and federal habeas relief.

Given the unusual circumstances of this case, the Court concludes that the one-year period should be equitably tolled for the period in which Petitioner's first habeas petition was pending before this Court. Consequently, Petitioner's one-year period did not begin to run until September 22, 1999. Approximately 11 months of the limitations period expired before Petitioner filed his state court motion for relief from judgment on August 25, 2000. The limitations period was then tolled from that time until the Michigan Supreme Court denied leave to appeal on October 29, 2002, as well as for the additional 90 days in which Petitioner could have sought a writ of certiorari with the United States Supreme Court. *See Abela v. Martin*, 2003 WL 22398701, __ F.3d __ (6th Cir. Oct. 22, 2003) (holding that "the limitations period is tolled from the filing of an application for state post-conviction or other collateral relief until the conclusion of the

time for seeking Supreme Court review of the state's final judgment on that application"). Petitioner signed the instant petition on November 25, 2002, well within the limitations period which would have expired in February, 2003. Respondent's motion for summary judgment must therefore be denied.

IV. Conclusion

Based on the foregoing analysis, the Court concludes that the petition for writ of habeas corpus should not be dismissed for failure to comply with the one-year limitations period established by 28 U.S.C. § 2244(d).

Accordingly;

IT IS ORDERED that Respondent's motion for summary judgment is **DENIED**.

IT IS FURTHER ORDERED that Respondent shall file an answer addressing the merits of Petitioner's habeas claims within **21 Days** of the date of this order.

_____/s/_____
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

DATED: December 8, 2003